Date: July 31, 1997

Case No.: 95-INA-00543

In the Matter of:

LINDA N. CASSANO & JAMES W. McDONALD, JR.,
Employers

On Behalf Of:

JANINA KONOPKA,
Alien

Appearance: Paul W. Janaszek, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employers' request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employers on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employers' request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On November 23, 1993, Linda N. Cassano and James W. McDonald, Jr. ("Employers") filed an application for labor certification to enable Janina Konopka ("Alien") to fill the position of Family Dinner Service Specialist, Live-Out (AF 5-6). The job duties for the position are:

> Plans menus and cooks meals according to recipes. Cooks vegetables and bakes breads and pastries. Boils, broils, fries, and roasts meats. Plans menus and orders foodstuffs. Cleans kitchen and cooking utensils. Serves meals. Performs seasonal cooking duties, such as preserving and canning fruits and vegetables, and making jellies. Accounts for the expenses incurred in purchasing foodstuff.

The requirements for the position are eight years of grade school, four years of high school, and two years of experience in the job offered.

The CO issued a Notice of Findings on February 23, 1995 (AF 32-34), proposing to deny certification on the grounds that it does not appear feasible that the job duties constitute full-time employment in the context of the Employers' household. The CO instructed the Employers to establish that the job offer meets the definition of "employment" as stated in the regulations at 20 C.F.R. § 656.50 (now recodified as § 656.3) by providing evidence which clearly establishes that the position, as performed in the Employers' household, constitutes full-time employment. Accordingly, the Employers were notified that they had until March 30, 1995, to rebut the findings or to cure the defects noted.

In their rebuttal, dated March 15, 1995, and submitted under cover letter dated March 29, 1994 (AF 35-81), the Employers contended that the offered position is full time and referred to the ETA 750A form where the weekly schedule and the duties of the position are identified. The Employers included with their rebuttal a weekly schedule for the cook which includes 15 breakfasts, 19 to 21 lunches, 31 dinners, and snacks. The Employers noted that on Tuesdays and Thursdays of each week they have dinners for an average of five business associates and/or clients, and the cook will also prepare six dinners for weekend consumption. The Employers stated that the cook will also be responsible for shopping, accounting for expenses, cleaning the kitchen area, and serving meals.

The Employers enclosed copies of bills for catering services and banquet hall rentals, which they have used for business entertaining in the past; however, they state that they expect to

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

entertain at home in the future. Ms. Cassano noted that she, also, has done cooking in the past, but that with her new position, she is unable to continue doing this. She further stated that all household maintenance duties will continue to be performed by the cleaning help and that she and her husband care for their child.

The CO issued the Final Determination on April 6, 1995 (AF 82-84), denying certification because none of the "evidence" provided by the Employers establishes that the job duties are full-time, eight-hour per day, 40-hour per week employment. Accordingly, the CO determined that the Employers remain in violation of the regulations at 20 C.F.R. § 656.3.

On May 11, 1995, the Employers requested review of the denial of labor certification (AF 85-103). On August 4, 1995, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board"). On August 29, 1995, Counsel for the Employers filed a Legal Brief. An Order to Show Cause was issued on September 20, 1995, requesting the Employers to submit a statement whether they wish to pursue this appeal. The Employers responded to the Order on October 19, 1995, that they intend to pursue labor certification for this Alien.

Discussion

The factual findings of the Certifying Officer generally are affirmed if they are supported by relevant evidence in the record as a whole which a reasonable mind might accept as adequate to support a conclusion. In the instant case, the CO made a factual finding that the Employer had not established that the job opportunity constitutes permanent, full-time employment. Thus, it must be determined whether that conclusion is a reasonable inference from this record.

Section 656.3 provides that "employment" means permanent, full-time work by an employee for an employer other than oneself. The employer bears the burden of proving that a position is permanent and full time. If the employer's own evidence does not show that a position is permanent and full time, certification may be denied. *Gerata Systems America, Inc.,* 8-INA-344 (Dec. 16, 1988). Further, if a CO reasonably requests specific information to aid in the determination of whether a position is permanent and full time, the employer must provide it. *Collectors International, Ltd.,* 89-INA-133 (Dec. 14, 1989).

In this case, the CO asked that the Employer supply specific information regarding the job opportunity (AF 32-33). Specifically, the CO requested that the Employer provide evidence regarding the following: (1) the number of meals prepared daily and weekly and the length of time required to prepare the meals and the number of people for which the meals are prepared; (2) the frequency of household entertaining in the 12 calendar month period immediately preceding the filing of the application, including the dates of entertainment and the number of guests entertained and the number of meals served; (3) the duties, other than cooking, that the Alien will be required to perform; (4) the daily and weekly work schedule of the parents, the school schedules of the children, and how the children are cared for during the Alien's scheduled time off; and, (5) who will perform the general household maintenance duties such as cleaning, clothes washing, vacuuming, etc.

In their rebuttal, the Employers asserted that the Alien would be required to cook 15 breakfasts, 19 to 21 lunches, and 31 dinners per week for them and their son (AF 78-80). In addition, the Employers stated that the Alien would be required to shop, account for expenses, clean the kitchen, and serve the meals. The Employers also stated that the Alien would be required to cook 10 additional dinners per week for business guests. To substantiate this assertion, the Employers submitted copies of bills for catering services and banquet hall rentals (AF 35-74). The Employers further stated that the household maintenance duties are performed by the cleaning help. Finally, the Employers explained that she works from 9:30 a.m. to 3:30 p.m., their son attends school from 9:00 a.m. until 3:00 p.m., and he works from 10:30 a.m. until 6:30 p.m.

As indicated, the issue here is whether or not the CO's conclusion, that full-time employment is not being offered, is a reasonable inference from these facts. We think not. The Employers have indicated the conditions of employment on the Application for Alien Employment Certification form ETA 750A, under penalty of perjury pursuant to 28 U.S.C. § 1746 (see 20 C.F.R. § 656.20(c)(9). These conditions of employment state that 40 hours of employment are being offered per week at a wage of $12.48 per hour. There is no evidence in the record to the contrary. Essentially, the dispute comes down to the Employers' assertion that preparation of a particular meal takes a certain amount of time, while the CO disagrees and says that the meal in question takes a lesser amount of time. The CO's conclusion that, in fact, the duties described could not constitute 40 hours of work, are speculative at best.

Therefore, we find that the CO's conclusion, that full-time employment is not being offered, is not supported by sufficient evidence. Further, in the absence of any evidence that this Employer is not credible, we find that this evidence is so compelling that no reasonable fact finder could find that full-time employment is not being offered. As no other objections to certification have been preserved by the CO, the application for Labor Certification will be granted.

ORDER

The Certifying Officer's denial of labor certification is hereby **REVERSED** and this matter is **REMANDED** for issuance of Labor Certification..

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

Judge Holmes dissents.

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.

Dolores DeHaan, Certifying Officer
U.S. Department of Labor/ETA
201 Varick Street, Room 755
New York, NY 10014